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IN THE

Supreme Court of the United States

October Term, 1972

No. 73-196

GUS SCLAFANI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY J. BOITEL
Attorney for Petitioner
233 Broadway
New York, New York 10007
(212) RE 2-8104

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Gus Sclafani prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on June 27, 1973, which affirmed his criminal conviction rendered in the United States District Court for the Southern District of New York.

Opinion Below

The opinion of the Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

Jurisdiction

The opinion of the Court of Appeals was filed on June 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1.)

Constitutional and Statutory Provisions Involved

This case involves the due process clause of the Fifth Amendment to the United States Constitution, as well as the Sixth Amendment rights of the petitioner, ". . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C. § 893 provides as follows:

> § 893. Financing extortionate extensions of credit
>
> Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credits, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years or both. *Added Pub.L. 90-321, Title II, § 202 (a), May 29, 1968, 82 Stat. 161.*

Questions Presented for Review

1. Did the trial court effectively prevent any meaningful defense access to a material witness (a co-defendant who had entered a plea of guilty) by its threat to compound the witness' prison sentence unless the witness remained away from the petitioner and "as far away as possible," from the trial? Did this constitute a violation of petitioner's rights to a fair trial, to the effective assistance of counsel, and to compulsory process for obtaining witnesses in his favor?

2. Since the proof revealed that petitioner was only a messenger in the alleged scheme, did the Government fail to establish the two counts which charged that he had financed extortionate extensions of credit (18 U.S.C. § 893)? Does not the statute on its face require that, for one to be guilty of violating it, he must be the source of the funds rather than a mere intermediary?

3. Should the trial court have dismissed the three income tax counts, and was it error for the trial court to have charged the jury that mere membership in the conspiracy was a sufficient basis upon which to find that the petitioner was liable for income tax purposes for an equal share of the proceeds of the conspiracy over the three years of its existence, notwithstanding the fact that the government's evidence revealed him to be involved in the events of the conspiracy for less than three months of that time, only as a messenger, and did not establish that he received any of the proceeds?

Statement of the Case

The indictment was filed on November 3, 1971, and petitioner was named in nine of thirty three counts. The essence of the charges was that he and five others * conspired to and did engage in a scheme to finance and collect extortionate extensions of credit (four counts; 18 U.S.C. §§ 371, 891, 893 and 894). The same indictment charged petitioner with failure to report as income the monies he allegedly received as payment of principal and interest with respect to the alleged extensions of credit (five counts; 18 U.S.C. § 1001, 26 U.S.C. § 7202).

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* Vincent Lore, Joseph Maida, and Joseph Randazzo entered pleas of guilty prior to trial. Angelo Tuminaro was a fugitive and did not stand trial. Thus, the trial herein had as defendants the petitioner and one Ben Ross.

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* Vincent Lore, Joseph Maida, and Joseph Randazzo entered pleas of guilty prior to trial. Angelo Tuminaro was a fugitive and did not stand trial. Thus, the trial herein had as defendants the petitioner and one Ben Ross.

Two of the tax counts were dismissed by the Court during trial. The jury returned a verdict of guilty as to each of the remaining charges.

Through the use of consecutive and concurrent sentences, an effective sentence of ten years imprisonment and a $30,000 fine were imposed upon the petitioner.

* * * * *

The conspiracy charged by the indictment and alleged by the Government's witnesses spanned the three year period from July, 1968 until July, 1971. The opinion of the Court of Appeals (Appendix A, *infra,* 1a *et seq.*) provides a broad review of the evidence without noting the very limited role alleged to have been played by the petitioner Sclafani. For that reason, we shall briefly recount the evidence as it applies to him.

Morton Kanof and Herbert Hurwitz were partners engaged in the construction business in New York City. Due to a shortage of operating capital and an inability to raise it through the usual legitimate channels, they let the word out that they were willing to pay loan shark rates. In July, 1968, they were introduced to Joseph Randazzo who agreed to lend them $25,000 at usurious rates (4a).

Although it was initially understood that the loan would be made in one lump sum, it appears that Randazzo had some difficulty in living up to expectations. Thus, commencing on September 9, 1968, through to October 7, 1968, he made advances to them totalling only $10,000. Some of the advances were in cash, while others were in the form of checks (which occasionally bounced). It was not until March 8, 1969, that the total $25,000 had been paid. In the meanwhile, the contractors were paying interest on the outstanding balance (4a).

Toward the beginning of March, the contractors began experiencing difficulty in meeting their weekly repayments

of the loan. Randazzo allegedly summoned them to a meeting at a social club in Manhattan, and, according to Kanof, Randazzo behaved wildly, waving a gun, and claimed that "his people" were going to take it out on him because the payments were not being made. The contractors responded that they would do their best (4a).

Toward the beginning of June, 1969, the contractors continued to have difficulty in keeping up with their weekly repayments, which they had been making directly to Randazzo. At that point, Randazzo allegedly introduced the petitioner Sclafani to them. This was petitioner's first appearance in any of the facts of this case. According to Hurwitz, the meeting occurred as follows:

> "Mr. Randazzo introduced Mr. Sclafani to me as Gus, and introduced the other gentleman, I don't remember his name, I never saw him again, and Randazzo then said that Gus was going to be making the payments from now on, and then Gus said to me, 'I don't want to get rough with you, but if I have to get rough, I will. I break legs or I break arms or I break hands. You bring that money to me every week'" (Tr. 1237).

Hurwitz also testified that, at this meeting, he requested and received from petitioner a telephone number at which petitioner could be reached (Tr. 1238).* For a short period of time thereafter, petitioner allegedly received most of the weekly payments from the contractors, and delivered additional funds to them.

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* The petitioner's brother-in-law testified that the telephone number in question was for the unlisted telephone at the home of petitioner's mother-in-law, with whom petitioner resided with his wife and baby daughter (Tr. 975) and that fact was so stipulated (Tr. 1051).

Thereafter, Randazzo introduced Kanof and Hurwitz to another co-defendant, Joseph Maida, in the latter part of July. Maida stressed the need for prompt payment. In turn, Kanof and Hurwitz requested that Sclafani be relieved of payment and collection duties since they were uncomfortable dealing with him. In or about the first week of September, petitioner's association with the matter terminated and he was not seen again. It can thus be seen that petitioner's alleged involvement in this matter covered, at most, only three months of a period of almost two and one-half years.*

It must be stressed that the only persons who claimed that petitioner was in any way involved in this case or that he raised the threat of force were Kanof and Hurwitz. Moreover, these witnesses, themselves, testified as follows:

Hurwitz:

"Q. Is it a fact that your entire dealing with respect to Mr. Sclafani encompassed the period from June through the end of September of 1969? A. Yes.

"Q. And prior to June of 1969 you never saw Mr. Sclafani? A. That is right.

"Q. *And subsequent to September of 1969 you never saw Mr. Sclafani? A. That is right.*

"Q. You saw him October 3rd, I think you said was the last date, is that right? A. Yes, sir.

* * * * *

"Q. Did he ever hit you? A. No.

* * * * *

"Q. Did you ever see him with a dangerous weapon? A. No.

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* As noted *infra*, even according to the testimony of the prosecution witnesses, his alleged participation may have been of an even lesser extent.

"Q. When for the first time did you ever hear Gus Sclafani's name mentioned or Gus? You didn't know him as Sclafani? A. I believe June 13th, 1969" (Tr. 1450-1452) [emphasis added].

Kanof:

"Q. Now, the entire scope of this transaction, then concerning the lending of this money encompassed, August of 1968 through November of 1970, is that correct? A. Yes, sir.

"Q. And there came a time when you became acquainted with my client, Mr. Sclafani? A. Yes, sir.

"Q. *For how long a period of time during the pendency of this entire transaction did you have occasion to have anything at all to do with Mr. Sclafani?* A. *Approximately two, two and a half* months.

"Q. And this was in 1969, is that correct? A. Yes, sir.

"Q. At any time, did Mr. Sclafani hit you? A. No, sir.

* * * * *

"Q. At any time, did Mr. Sclafani show you a gun? A. No, sir.

"Q. At any time, did Mr. Sclafani perpetrate any physical violence on you? A. No, sir" (Tr. 571-572) [emphasis added].

It will be noted that there is some variance between the testimony of Hurwitz and Kanof as to the beginning and terminating dates of petitioner's involvement; however, they are both clear that the length of his involvement was short and that he was not again seen or heard of thereafter,*

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* A New York City detective was called as a prosecution witness and testified (Tr. 1736-1756), over objection, that he had petitioner under surveillance at points during the period from

[Footnote continued on next page]

that he never so much as touched them, and that he never exhibited a weapon to them. Neither of them testified that any discussions were held in petitioner's presence or that petitioner ever said anything which indicated that he had any economic stake in the venture.

Predicated upon the above, petitioner was charged with full responsibility for the totality of a conspiracy which extended for almost two years following his exit from the case, and he was charged with income tax violations upon the theory that one-fifth of the payments made by Hurwitz and Kanof, during this entire period, as to both interest and principal, was attributable to him.*

[Footnote continued from prior page]
October 19, 1970 until April, 1971. During October and November, 1970, he saw Sclafani and Randazzo together on a few occasions in the lower East side area where petitioner resided. On one of these occasions, he took a photograph of the two men together. The photograph, although taken after the arrest in the present case, was admitted into evidence, over objection. The prosecution conceded that the only purpose served by the detective's testimony and by the photograph was "for the purpose of showing real evidence that Randazzo and petitioner did know each other" (Tr. 1740). The detective had no knowledge concerning the length of time that the two men were acquainted, and never observed Sclafani commit any crime with Randazzo (Tr. 1756).

The prosecutor later stipulated that a defense witness would testify that Randazzo and petitioner had been friends for at least twenty years (Tr. 2266-2267).

* It was stipulated by the defense that Government Exhibits 152 and 153 were the Federal income tax returns of petitioner and his wife for the years 1968 and 1970, respectively, and that the defendant did not file an income tax return for the year 1969 (Tr. 2201-2202). It was further stipulated that the accountant who prepared the 1970 return would testify that the defendant stated that he derived his income solely from the wholesaling of general merchandise (Tr. 2200-2201). It was also stipulated that the petitioner's signature on the 1968 return was genuine (Tr. 2253), and that, although the petitioner did not sign the 1970 return, he did, in fact, file it (Tr. 2254).

Petitioner was, on this evidence, convicted upon all of the charges with the exception of two of the five income tax counts.

* * * * *

The above-noted facts constituted a very small part of the total proof in this case, as revealed by the facts contained in the Opinion of the Court of Appeals (Appendix A, *infra*). The events which followed petitioner's last appearance in the facts of this case depict a scene of terror, corruption, attempted subornation and a bifurcation of the original scheme into what can only be described as a hydra-headed multiplicity of schemes and objectives.

REASONS FOR GRANTING THE WRIT

I. The Intimidation of the Prospective Witness, Lore.

A. The Factual Background

On *March 3, 1972,* prior to the instant trial, one of the defendants, Vincent Lore, entered a plea of guilty to certain of the charges contained in this and a related indictment (A. 41-76). During the course of the plea proceedings, the Court (the same judge who presided at the instant trial) interrogated Lore concerning some of the facts of the case. Significantly, Lore named as the source of the funds in the case and the source of his own directions, a person by the name of Hymie Rabinowitz (A. 63-64).* Rabinowitz was not named as a defendant in this case, nor otherwise mentioned in the indictment, and this version of events did not comply with the Government's trial theory. Moreover, Lore, referring to his own income from the transactions involved herein, told the Court: "I made nothing out of this here. I didn't make a quarter out of this here" (A. 65). This contention was in direct contradiction of the

* Citations preceded by "A" are to the appellants' appendix in the Court of Appeals.

Government's theory underlying the tax charges of the indictment.

During the course of the plea proceeding, the prosecutor (who was also the trial prosecutor herein) noted that ". . . the possibility is an extremely good one that" Lore might be a defense witness at the trial of the petitioner (A. 72).

On *June 12, 1972* (A. 79-93), Lore requested that the Court sentence him upon his plea, and the Court set the sentence down for June 28, 1972. The colloquy on June 12th makes three things crystal clear: 1) The Court was extremely well impressed that Lore had turned over a new leaf and intended to be a law abiding citizen;* 2) The Court intended to sentence Lore on all but one count; 3) The remaining count would not result in an additional period of incarceration for Lore *if* he at least remained neutral in the coming trial of petitioner; however, if he should testify beneficially to petitioner, the Court would throw the book at Lore when it came time for him to be sentenced on the remaining count.

The following extracts from that proceeding are illustrative:

> "The Prosecutor: * * * [I]t is my belief based upon the statements—made by Mr. Lore at the time of his arraignment on his plea of guilty that there

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* "The Court: I must confess that I was very deeply impressed by this young man's desire to square himself with God and Family . . ." (A. 78).

"The Court: * * * He is a very young man with two infant children. * * * He wants to square himself with all of his obligations * * *" (A. 80).

"The Court: My impression is that this young man, at the present time is anxious to step up front and be counted, and he wants to pay whatever penalty he has to pay and get it over with" (A. 84).

"The Court: * * * I was deeply impressed—I hope that some day you will read the letter he [Lore] wrote me—I was deeply impressed with what I believe has been a turning point in his life" (A. 88-89).

is a very strong possibility that Mr. Lore is going to elect to take the stand in this case, and testify for the defendants. I state to this Court positively and unequivocally that if Mr. Lore takes the stand and testifies as I feel he will, there is a very strong likelihood that Mr. Lore will be indicted on charges of perjury.

"It is my belief that Mr. Lore would rather have himself sentenced before he took the stand to testify for the defendants in this case, because if the falsity of his testimony was apparent to your Honor, as well as to the members of the jury, that might be a factor which your Honor would want to take into consideration.

"The Court: I have a way out of that. I can impose a sentence that I think he ought to have on one of the counts, and I can leave the other count open with a reservation that if he takes the stand and commits perjury I would take into account all of the subsequent conduct with respect to the other count.

"If I had no reason to suspect this man was acting in bad faith, but was trying to unburden his soul of his problem, then I would just make the sentence concurrent with the other count.

"[The Prosecutor]: That being the case, if your Honor were of a mind to do that, then the government can see no real objection to his not being sentenced before" (A. 85-87).

* * * * *

"The Court: You see, what it amounts to is this: if his conduct after his sentence was such that I could come to a conclusion that he had done something reprehensible, if he came on as a witness and committed perjury, or did something else of a similar nature, he would have to expect that his sentence on

the additional count would be increased. On the other hand, if the situation has not been substantially changed and if my evaluation of his situation at the time of sentence remains substantially accurate, when the time comes for the imposition of sentence on the open count, then I would make that sentence on the open count concurrent with the sentence already imposed.

"[Counsel for Lore]: That is one way of handling it. I am just wondering why Mr. Aronwald feels that my client is going to commit perjury. It is always open to him to indict him for perjury under those circumstances.

"The Court: Have you any idea, or perhaps you do not care to tell me, and maybe it is none of my business, but have you any idea what his disposition is with respect to testifying at this trial as a witness for the defendants?

"[Counsel for Lore]: I don't know. I have not conferred with him.

"The Court: It would be better if he had nothing to do with it. I don't want to deprive anybody of the right to call witnesses. It is a God-given right. The government could call him, just as they could. But I think from his standpoint it would be better if he had as little to do with the case as possible.

"[Counsel for Lore]: That would be true from his point of view. I know there is a long association between him and Mr. Ross, and so you can't duck that in this situation. And I suppose it wouldn't happen, but it occurred to me as Mr. Aronwald was speaking, and I am troubled by this thought: suppose a jury were to convict Mr. Ross, does that enable Mr. Aronwald to say: 'You see, Mr. Lore was lying when he was on the witness stand?'

"The Court: I don't know. Mr. Aronwald will come to his conclusions at the proper time and I will come to my own. We are leaving an area open for possible evaluation by him and by me. I feel very strongly that I would be doing this young man, as well as the community, a disservice in keeping him in this position, and I don't want to keep him in this position. On the other hand, I don't want to destroy any legitimate request that the government may have. I am caught on the horns of a dilemma" (A. 19-21).

* * * * *

"The Court: That is what I plan to do. There are three counts. I will sentence him on two counts, hold one count open with the intention that unless there are some serious untoward circumstances which should affect me, persuade me that I should modify the sentence, my intention would be to impose a concurrent sentence on the open court. But if there is something that is serious enough and persuasive enough to make me feel that the sentence I gave him was inadequate and improvident, then I would feel free to impose additional punishment. That is the only way I can think of that would satisfy the fields of Aronwald that perhaps we are caught in a trap by doing this" (A. 92-93).

On *June 28, 1972,* Lore appeared before the Court for sentence, and the Court said:

"The Court: I am going to impose sentence today on the two counts of the extortionate loan and the income tax case. Because of his changed situation due to the recent death of his father, I am going to keep the other count open. Hopefully, his conduct between now and the end of the trial of the other defendants will be such that I won't be called upon to impose an additional sentence, and at that time I hope that the sentence. [*sic.*]

"If any facts develop between now and then which lead me to believe that he is guilty of reprehensible conduct. [*sic.*]

"That is the posture in which this matter presents itself. He has pleaded guilty. The maximum sentence unless I choose to impose consecutive sentences on the indictment which I want to deal with today are five years on each count plus a fine" (A. 100).

Lore's attorney addressed the Court as follows:

"[Counsel for Lore]: I want to say with regard to the letter that Mr. Aronwald sent me, I conferred with Mr. Lore today about it at considerable length and I am prepared to say this—and I know it is your Honor's feeling and I know it is my feeling that in any trial here Mr. Lore should stay absolutely as far away from participating as the law would permit. If Mr. Aronwald or anybody else feels that a subpoena is appropriate, to have him come, we will come and he will testify and he will tell the truth. But other than that, your Honor, he has no intention of being a voluntary participant for anybody. I don't think that that is at all inappropriate, given the circumstances, and I don't think that it should weigh one way or the other. If Mr. Aronwald wants to subpoena him and put him on the stand, he is going to tell the truth, but it is not his intention to come for anybody" (A. 106-107).

The Court additionally noted:

"And you remember how late we stayed discussing that. You were bitterly opposed to Mr. Aronwald's motion, and I agreed to do it on the suggestion that he could be sentenced on two of these three counts and one would be left open, the obstruction

of justice count would be left open until after the trials were disposed of, and hopefully if there were no facts indicating any reprehensible conduct by this defendant I would make the sentence concurrent on that open count. If there were facts which would lead me to believe that his conduct was not above reproach, I would have to reconsider the entire matter and possibly impose a consecutive sentence" (A. 109).

and:

"[The Court]: You stand before me exposed to penalties of five years on each of these counts. As I told the attorneys and as the attorneys have agreed and you have agreed, I am not going to sentence you on the obstruction of justice indictment. I am going to leave that open. Hopefully I will not have any obligation to impose a consecutive sentence, but there—though there is that unpleasant possibility which looms over your head.

"Your attorney told me that he hopes that you will stay as far away as possible from the unfinished cases, and I hope that will be true. I hope that you will have the courage and the strength to tear out the roots that you have in this community, because I think that they are like an infected sore. I think that you have been brought up, up to this point, exposed to crime and with people involved in crime, and as long as you stay within shouting distance or even communication distance of these people your future is going to be tainted and infected. I think that you ought to find new horizons in a new community, far away from the one in which you have lived and to find new strength and new rewards far away from the people who have poisoned your existence and placed you on the road of delinquency" (A. 111-112).

The Court imposed a sentence of four (4) years imprisonment upon Lore, pursuant to the provisions of 18 U.S.C. § 4208(a)(2), thus making him eligible for immediate release in the discretion of the Parole Board, leaving the remaining count open (A. 112-113).

By an affidavit of prejudice, pursuant to 28 U.S.C. § 114 and dated August 21, 1972, counsel for the defendant Ross sought to have the trial Judge disqualify himself based upon the Judge's conduct with respect to Lore as recited above. Counsel stated that he had, in the Spring of 1972, interviewed Lore and that Lore had exculpated Ross (A. 129-130). Counsel asserted that, as a result of the Court's remarks to Lore, Lore had become unavailable as a defense witness (A. 132-133), thus depriving Ross of due process of law. Counsel asserted that by the aforesaid incidents "the Court has made clear its prejudice effectively precluded the defendant Ross from having the in favor of the Government's position and its conduct has testimony of a cooperative witness" (A. 134). Also submitted was the affidavit of the defendant Ross in which it was stated:

> "Everything set forth in Mr. Goldberg's affidavit is adopted herein. After Vincent Lore's court appearance on June 12, 1972, he advised me he would no longer be available to me as a witness to testify to my innocence. The reason as he expressed it was that he could not risk angering the Judge and the Judge had advised him not to testify as a defense witness" (A. 136).

On August 30, 1972, the Court denied the motion as being without merit (A. 137-139).

On September 11, 1972, the first day of trial, counsel for Ross again raised with the Court his frustrations in being unable to secure the attendance of Lore (who was

then in a Federal penitentiary in Petersburg, Virginia), for an interview in the presence of his attorney. Both the prosecutor and the Court, in substance, appear to have acknowledged that it would be foolish to call Lore as a witness without first having the opportunity to interview him. Thus, the prosecutor noted that he would not call Lore as a witness "in view of his attitude" (A. 118) and the Court noted to Ross' attorney "would you put him on the stand and start talking to him?" (A. 119). Counsel for Lore was present at the proceedings and stated that Lore did not intend to talk to anyone and was not going to voluntarily testify since:

> "On the sentencing I think your Honor stated that Mr. Lore would be well advised to stay as far away from this case as possible, in substance, if not in words" (A. 121).

Expressing a concern for the financial expenditures involved, the Court refused to order Lore's return to New York, stating:

> "I am not going to bring him here if you have no intention of calling him as a witness. You told me twice today that unless you could confer with him, you would not call him as a witness" (A. 124).

The Court requested that Lore's counsel confer with Lore by special delivery letter for the purpose of ascertaining whether Lore had changed his mind (A. 125).

During the course of the trial, Lore's attorney advised that he was not certain whether he would permit an interview of his client (Tr. 393).

B. The Nature of the Due Process Violation

In *Webb* v. *Texas*, — U.S. —, 93 S. Ct. 351 (1972), this Court reversed a criminal conviction under the following circumstances:

> "The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of

The Court imposed a sentence of four (4) years imprisonment upon Lore, pursuant to the provisions of 18 U.S.C. § 4208(a)(2), thus making him eligible for immediate release in the discretion of the Parole Board, leaving the remaining count open (A. 112-113).

By an affidavit of prejudice, pursuant to 28 U.S.C. § 114 and dated August 21, 1972, counsel for the defendant Ross sought to have the trial Judge disqualify himself based upon the Judge's conduct with respect to Lore as recited above. Counsel stated that he had, in the Spring of 1972, interviewed Lore and that Lore had exculpated Ross (A. 129-130). Counsel asserted that, as a result of the Court's remarks to Lore, Lore had become unavailable as a defense witness (A. 132-133), thus depriving Ross of due process of law. Counsel asserted that by the aforesaid incidents "the Court has made clear its prejudice effectively precluded the defendant Ross from having the in favor of the Government's position and its conduct has testimony of a cooperative witness" (A. 134). Also submitted was the affidavit of the defendant Ross in which it was stated:

> "Everything set forth in Mr. Goldberg's affidavit is adopted herein. After Vincent Lore's court appearance on June 12, 1972, he advised me he would no longer be available to me as a witness to testify to my innocence. The reason as he expressed it was that he could not risk angering the Judge and the Judge had advised him not to testify as a defense witness" (A. 136).

On August 30, 1972, the Court denied the motion as being without merit (A. 137-139).

On September 11, 1972, the first day of trial, counsel for Ross again raised with the Court his frustrations in being unable to secure the attendance of Lore (who was

then in a Federal penitentiary in Petersburg, Virginia), for an interview in the presence of his attorney. Both the prosecutor and the Court, in substance, appear to have acknowledged that it would be foolish to call Lore as a witness without first having the opportunity to interview him. Thus, the prosecutor noted that he would not call Lore as a witness "in view of his attitude" (A. 118) and the Court noted to Ross' attorney "would you put him on the stand and start talking to him?" (A. 119). Counsel for Lore was present at the proceedings and stated that Lore did not intend to talk to anyone and was not going to voluntarily testify since:

> "On the sentencing I think your Honor stated that Mr. Lore would be well advised to stay as far away from this case as possible, in substance, if not in words" (A. 121).

Expressing a concern for the financial expenditures involved, the Court refused to order Lore's return to New York, stating:

> "I am not going to bring him here if you have no intention of calling him as a witness. You told me twice today that unless you could confer with him, you would not call him as a witness" (A. 124).

The Court requested that Lore's counsel confer with Lore by special delivery letter for the purpose of ascertaining whether Lore had changed his mind (A. 125).

During the course of the trial, Lore's attorney advised that he was not certain whether he would permit an interview of his client (Tr. 393).

B. The Nature of the Due Process Violation

In *Webb* v. *Texas*, — U.S. —, 93 S. Ct. 351 (1972), this Court reversed a criminal conviction under the following circumstances:

> "The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of

perjury. But the judge did not stop at warning the witness of his right to refuse to testify and of the necessity to tell the truth.* Instead, the judge implied that he expected Mills to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted of perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole. At least some of these threats may have been beyond the power of this judge to carry out. Yet in light of the great disparity between the posture of the presiding judge and that of a witness in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify.

"In Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967), we stated:

> 'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to estab-

---

"* *Cf. United States* v. *Winter*, 348 F.2d 204, 210 (1965), where Judge Weinfeld, writing for the Second Circuit, stated:

> 'Once a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it.'"

> lish a defense. This right is a fundamental element of due process of law.'
>
> "In the circumstances of this case, we conclude that the judge's threatening remarks, directed alone at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment. The admonition by the Texas Court of Criminal Appeals might well have given the trial judge guidance for future cases, but it did not serve to repair the infringement of the petitioner's due process rights under the Fourteenth Amendment.
>
> "Accordingly, the judgment is reversed."
>
> (93 S. Ct. 351, 353-354).

Under the circumstances of the present case, the trial Judge's treatment of the potential defense witness, Lore, was even more oppressive. In *Webb*, the trial Judge's threats would, at most, lead to a perjury trial where the witness would be able to argue his innocence to a jury. In the present case, since the trial Judge had yet to pass an open sentence on Lore, the Judge's power was absolute, and his threat to impose a maximum consecutive sentence was completely within his power and that power was exercisable to its fullest extent at the slightest whim of the Judge.

The Court's conduct in the present case had precisely the same effect as the intentional suppression of evidence by a prosecutor. Cf. *Brady* v. *Maryland*, 373 U.S. 85 (1963); *United States* v. *Polisi*, 416 F.2d 573 (2d Cir., 1969).

The gravely prejudical character of prosecutorial conduct similar to that of the Court in the present case has been repeatedly condemned. *Bray* v. *Peyton*, 429 F.2d 500 (4th Cir., 1970); *Coppolino* v. *Helpern*, 266 F. Supp. 930 (S.D.N.Y., 1967)

The *American Bar Association Standards Relating to the Prosecution Function* (Approved Draft, 1971), Section 3.1(c) specifically provides:

> "(c) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give [information] to the defense information which he has the right to give."

There is no conceivable reason why the same standards of professional conduct should not apply to a Judge. Indeed, as held in *Webb, supra,* the standards are the same. *See also*: *Ex Parte Hudgins,* 249 U.S. 378, 384 (1919); *Scott* v. *United States,* 419 F.2d 264, 269 (D.C. Cir. 1969); *United States* v. *Marzano,* 149 F.2d 923 (2d Cir. 1945).

C. The Effect of the Court's Suppression of Evidence Upon Petitioner

If Lore had voluntarily testified, his testimony would have contradicted the prosecution's case at least with respect to the details which he divulged at the time he entered his plea of guilty, *supra,* p. 10. Moreover, he could have provided the jury with a true insight into whether petitioner was understood by him to have continued in the conspiracy during the year following the last mention of petitioner in the testimony. If petitioner was not a member of the conspiracy during that period, then the extensive prejudicial evidence concerning the events of that year would not have been admissible against him. Who, better than Lore could attest to petitioner's status? It was Lore who was dealing with both ends of the loansharking operation. Finally, Lore would have been in a position to repudiate or verify their versions of events. Since it was only the credibility of these

witnesses that stood between petitioner and an acquittal, such information would have been of invaluable aid to the defense and to the jury.*

It befits the Government to claim that Lore would not have been an important and material witness. The Government's efforts to secure him as a Government witness are spread upon the record (Tr. 96-99).

For all of the above reasons, we respectfully submit that the defendant was deprived of due process of law by virtue of the Court's conduct with regard to the witness Lore.

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* The testimony of Kanof and Hurwitz constituted the only evidence of the alleged involvement of petitioner and the nature of that involvement. Their credibility was sharply in issue. They admittedly spent over 200 hours together preparing their testimony, and each passed off the other's experiences as his own (Tr. 39-41), 61-81, 215-6, 259).

In their statements to the Grand Jury and to the FBI, they claimed that petitioner had delivered $50,000 to them; however, in their trial testimony they reduced the amount to $25,000 (Tr. 575-8, 2901-2). In their statement to the FBI, it was not noted that petitioner had threatened them (an essential element of the crime charged) (Tr. 2891). The memoranda they had kept during the course of the alleged conspiracy, noted the name of someone else as having collected payments from them, during the time, according to their trial testimony, that the petitioner was making all such collections (*See*: Gov. Exs. 55-7, and Tr. 224, 262-4). At trial they testified that petitioner had commenced receiving payments from them in early June, 1969 (Tr. 216, 1237), but later changed the time to June 11, 1969 (Tr. 225-32, 252-68).

Both men had convictions involving separate substantial larcenies (Tr. 536, 661-5, 855-8, 1401-2). Additionally, they engaged in the use of fictitious payrolls and fraudulent billing practices (Tr. 70, 743-54, 914-5), and were involved in a municipal housing scandal (Tr. 291-3). Although it permitted the defense to elicit the existence of the convictions, the trial court would not permit examination as to the underlying facts (Tr. 516-7, 857-8, 391-3, 743-54, 1401-2, 1553-6).

II

II. The Failure of the Government to Establish that Petitioner Violated 18 U.S.C. § 893.

The instant point was briefed and argued in the Court of Appeals, however, it is not discussed in the Court's opinion. It raises a question of statutory interpretation which does not appear to have been considered by any Court.

18 U.S.C. § 893 provides as follows:

> **§ 893. Financing extortionate extensions of credit**
>
> **Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention *of that person* to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years or both. *Added Pub.L. 90321, Title II, § 202 (a), May 29, 1968, 82 Stat. 161* [emphasis added].**

Count 3 of the Indictment charged that all of the defendants, including petitioner, conspired to violate §893 in that:

> **"Said defendants would unlawfully, wilfully and knowingly advance money pursuant to a partnership agreement and profit-sharing agreement, as a loan, as an investment and otherwise, to the defendant Joseph Randazzo, *Gus Sclafani* [petitioner] and Joseph Maida, with reasonable grounds to believe that it was the intention of the said Joseph Randazzo, *Gus***

> *Sclafani* [petitioner] and Joseph Maida to use the money so advanced directly and indirectly for the purpose of making extortionate extensions of credit" (A. 12-13) [Emphasis added].

Count 4 of the indictment charged a substantive violation of § 893, alleging that *petitioner*, together with the other defendants, advanced money to Randazzo, *Sclafani* [petitioner] and Maida with reasonable grounds to believe that it was the intention of Randazzo, petitioner and Maida to use the money so advanced for the purpose of making extortionate extensions of credit (A. 14-15).

We respectfully submit that these two counts should have been dismissed.

1. The proof in this case was utterly devoid of any showing that petitioner ever advanced any money or property to another person for the purpose of having *the other person* effect an extortionate extension of credit. If anything, the only proof in this case with regard to petitioner was that he gave money to the ultimate recipients. It will be observed that the statute does not make the receipt of such funds by the second party a crime with respect to the second party.

2. The proof in this case is utterly devoid of any showing that petitioner anticipated, intended or did, in fact, share in any profits from the loan transactions, as alleged by Counts 3 and 4 of the indictment.

3. The events of this case take on three distinct stages: a) the advancement of money through Randazzo to Kanof and Hurwitz; b) the advancement of money through petitioner to Kanof and Hurwitz; and c) the advancement of money through Maida to Kanof and Hurwitz. With regard to the first stage, petitioner can hardly be held liable on some type of conspiracy theory since

the activities which are made illegal by the statute had all been completed prior to petitioner's alleged participation in the conspiracy. With regard to the second stage, petitioner cannot be held liable for having conspired to give something to himself. The statute requires a concert of action between the initial party or parties and the intermediary. As was held in *United States* v. *Sagor*, 49 F.2d 725, 727 (2d Cir., 1931), "where concert is necessary to an offense, conspiracy does not lie." As far as the third phase was concerned, there was no proof that Selafani was the source of any funds to an intermediary, or that he even knew that additional funds were intended to be, or were, in fact, advanced to an intermediary for ultimate distribution to Kanof and Hurwitz.

III. The Attribution of Taxable Profits to Petitioner Upon a Criminal Conspiracy Theory.

The theory upon which the government sought to hold the petitioner liable for a portion of the income derived from the loan transactions in this case, was expressed by a stipulation which was read to the jury by the prosecutor in place of the testimony of a Government witness. The defense merely stipulated that the witness in question would so testify, but did not stipulate as to the truth of the content of such testimony. The stipulation provided, in pertinent part, as follows:

> "That in the event that each of the defendants and the named co-conspirators are found by their actions or expressed by words or deeds *a proprietary interest in the loan transaction,* then the Internal Revenue Service deems each to be a participant in the joint venture or partnership return as required by law, the Internal Revenue Code was filed on behalf of this joint venture for the years 1968, 1969 and 1970; that in the absence of such a partnership return being filed or proof of the existence of a partnership agreement, either of which would set

> forth the respective distributive share of the proceeds for each partner or participant in the joint venture, the Internal Revenue Service deems each to share equally in the proceeds, that is to say take the income in the years '68, $11,206.92; for the year '69, $65,588.35 and for the year 1970, $76,834.24 chargeable to each of the participants and that each of the participants are chargeable with one-sixth of the interest income of the joint venture" (Tr. 2295-2298). [Emphasis added]*

In its charge to the jury, the Court completely omitted any reference to the requirement that a proprietary interest be shown before a taxpayer can be assumed to have shared in certain income. The Court merely charged the jury as follows:

> "Now, what the government did—and that is covered by the stipulation which you can or cannot accept depending upon your review of the fact—what the government did was to say, we have no affirmative proof as to what these partners shared with respect to this income. We assume that there was a joint partnership or a joint venture to engage in this loansharking. We assume, therefore, in the absence of affirmative proof, that the income was divided equally. That is a tax collection fiction applied by a tax collecter when he doesn't know the facts any better, when he has no additional information, and there is proof or in this case the as-

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*It should be noted that, immediately after the stipulation had been read to the jury during the course of the trial (it was not again read during the charge), the Court gave a preliminary instruction on the law to the jury and failed to indicate the necessity for them to find that the defendant had some proprietary interest in the loan repayments. Instead, the Court merely spoke in terms of ". . . a joint venture by certain individuals to enact a usurious transaction or to extend usurious credit loans . . ." (Tr. 2307).

sumption—as far as these schedules are concerned it is an assumption—that there was a partnership. Then the fiction or the rule of thumb, which is applied, is that each partner shares equally" (A. 259-260).

* * * * *

There was not a scintilla of proof in this case that the petitioner had any type of a proprietary interest in the income derived from the loans in question. At best, a fair reading of this record makes him out to be a mere messenger for a limited period of time. Although the evidence does not show that he received any compensation for his alleged efforts, if he did receive such compensation, nothing is indicated by the record that his payment was in the form of a vested interest in the proceeds of the loan. The factual situation presented by this record is no different from that in *United States* v. *Calamaro,* 354 U.S. 351 (1957), where it was held that mere intermediaries ("pick-up men") in a lottery operation did not, as such, have a proprietary interest in the enterprise, 354 U.S. 351, 353-354.

Furthermore, the Court's charge to the jury, in omitting the essential element of a proprietary interest, permitted the jury to convict upon a mere finding that the defendant was a participant in the conspiracy. It is clear that the two standards are worlds apart. Guilty participation in a conspiracy does not require a vested interest in the financial objectives of the conspiracy.

* * * * *

The District Court correctly charged the jury that, in order to convict the defendant, it was necessary for them to find that he knowingly and wilfully failed to report his true income (A. 207-208). These essential elements of the tax crimes charged clearly demonstrate the insufficiency of the evidence in this case against petitioner with respect

to the tax charges. Assuming *arguendo,* that the law and the facts are such that petitioner could be held criminally liable for the full range of transactions involved in the extensions of credit, the only theory upon which such liability can hang, is that a conspirator is liable for the activities of his co-conspirators in furtherance of the conspracy, *even though he is not aware of all of those activities.* However, that same theory will not support a tax prosecution based upon the income derived by some of the co-conspirators through the conspiratorial activities. Knowledge and wilfulness are prerequisites for a criminal tax conviction, and no such knowledge was shown by the proof in this case except with regard to the minor portion of repayments allegedly collected by petitioner over a two month period. The vicarious liability flowing from a conspiracy cannot supply these missing elements. In view of the utter failure of the Government to establish such knowledge, the petitioner's failure to include such income in his returns cannot possibly be deemed to have been wilful.

Although these questions were raised in brief and argument before the Court of Appeals, they were not considered in the Court's opinion.

IV. Petitioner Gus Sclafani Adopts All Applicable Points Raised by the Petition for a Writ of Certiorari Scheduled to be Filed by the Co-Defendant Ben Ross.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

HENRY J. BOITEL
Attorney for Petitioner

July, 1973

APPENDIX

Appendix A—Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 828, 829—September Term 1972.

(Argued May 10, 1973 Decided June 27, 1973.)

Docket Nos. 73-1017, 73-1048

UNITED STATES OF AMERICA,

Appellee,

v.

GUS SCLAFANI and BEN ROSS,

Appellants.

BEFORE:

SMITH, MULLIGAN and TIMBERS,

Circuit Judges.

Appeals from judgments of conviction after jury trial in the Southern District of New York, Edmund L. Palmieri, *District Judge,* finding both appellants guilty of violating the Extortionate Credit Transaction Act, of conspiring to do so, and of income tax evasion; also finding appellant Sclafani guilty of making a false statement and appellant Ross guilty of filing false and fraudulent income tax returns.

Affirmed.

HENRY J. BOITEL, New York, N.Y., *for Appellant Sclafani.*

ROY M. COHN, New York, N.Y. (Gretchen White Oberman, and Saxe, Bacon, Bolan & Manley, New York, N.Y., on the brief), *for Appellant Ross.*

WILLIAM I. ARONWALD, Special Atty., Organized Crime and Racketeering Section, Dept. of Justice, Wash., D.C. (Whitney North Seymour, Jr., U.S. Atty., and John W. Nields, Jr., Asst. U.S. Atty., New York, N.Y., on the brief), *for Appellee.*

TIMBERS, *Circuit Judge:*

Appellants Gus Sclafani and Ben Ross appeal from judgments of conviction entered upon jury verdicts returned October 6, 1972 after a nineteen day trial before Edmund L. Palmieri, *District Judge,* in the Southern District of New York.

Sclafani was convicted on three counts of loansharking, in violation of the Extortionate Credit Transaction Act of 1968, 18 U.S.C. §§893 and 894 (1970); on one count of conspiring to finance an extortionate credit transaction, in violation of 18 U.S.C. §371 (1970); on two counts of income tax evasion, in violation of 26 U.S.C. §7201 (1970); and on one count of making a false statement, in violation of 18 U.S.C. §1001 (1970). On December 4, 1972, an effective sentence of ten years imprisonment and a $30,000 fine was imposed on Sclafani.

Ross was convicted on two counts of loansharking, in violation of the Extortionate Credit Transaction Act; on one count of conspiring to finance an extortionate credit transaction; on three counts of income tax evasion; and on three counts of filing false and fraudulent income tax returns, the latter in violation of 26 U.S.C. §7206(1)(1970).

On December 11, 1972, an effective sentence of fifteen years imprisonment and a $90,000 fine was imposed on Ross.[1]

The chief claim of error raised on appeal by both appellants is that they were precluded from calling a co-defendant as a witness at their trial because of certain remarks made by the trial judge in accepting the co-defendant's change of plea and in sentencing him several months before the trial began. Other subordinate claims of error are raised by both appellants.

We affirm.

I.

Events Leading to Indictment

In view of the issues raised on appeal, a summary description of the loansharking scheme of considerable dimensions which constituted the core of this case, and the conduct for which appellants were convicted, will suffice.

The scheme in substance was that appellants loaned ever increasing sums of money to two borrowers at enormous rates of interest. They proceeded to collect the interest and other payments by threats of death, maiming and other violence. The exorbitant interest rates and other terms of extortion, rather than alleviating the borrowers' financial difficulties, forced them to borrow additional amounts. This continued to compound the plight of the victims. Eventually, faced with still further threats of physical injury and death, the victims turned to the F.B.I.

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1 The indictment was returned November 3, 1971 (the "extortion indictment", to be distinguished from the "obstruction of justice indictment", referred to below). It charged defendants Vincent Lore, Joseph Maida, Joseph Randazzo and Angelo Tuminaro, as well as the two appellants, with various violations. Prior to trial, Lore, Maida and Randazzo entered pleas of guilty. Tuminaro was a fugitive. The trial proceeded against Sclafani and Ross as defendants.

The sequence of events that led to the instant indictment began with the financial problems of Morton Kanof and Herbert Hurwitz, two contractors specializing in ghetto building reconstruction. In July 1968, Kanof and Hurwitz, who were then in need of $25,000, were put in touch with defendant Joseph Randazzo. He agreed to lend them the sum on these terms: interest at 3% per week; principal repayment in amount of $100 per week; two bogus payroll checks, each in amount of $125 per week, one of which was to go to defendant Joseph Maida; and a $2,000 bonus to Randazzo.

By October 7, Randazzo had delivered $10,000 of the $25,000 promised. Nevertheless, Kanof and Hurwitz were required to make payments pursuant to the original agreement. Subsequent deliveries of money and revisions of the loan resulted in the borrowers making payments in amount of $930 per week by the end of 1968.

Beginning February 1969, the borrowers' payment checks started to bounce. They encountered increasing difficulty in making the required payments. Randazzo began threatening them at gunpoint, purportedly on orders from higher up.

In June 1969, Randazzo introduced Hurwitz to appellant Sclafani as the person who was to receive all further payments. Hurwitz was informed by Sclafani that he "breaks legs, arms and heads" when necessary.

By late July 1969, Kanof and Hurwitz were in need of an additional $50,000. They had a meeting with Randazzo and Maida, at which it was agreed that this further sum would be loaned on these terms: the total principal would be computed as $100,000; interest at 3% per week would be paid on that principal amount; and four bogus payroll checks per week, each in amount of $175, would be required. The additional $50,000 was delivered to the borrowers by

Sclafani and Maida in three installments by October 24, 1969. At that point the required weekly *interest* payments were in amount of $3,000.

In December 1969, Kanof and Hurwitz again encountered difficulty in making payments. Maida informed them that he was in trouble with his people. He introduced Kanof and Hurwitz to defendant Vincent Lore who made some direct threats and ordered prompt payment of the arrearage.

At a subsequent meeting between Maida, Lore and the two borrowers, the latter requested a further $10,000 loan with which to make their back-payments. The loan was arranged at $4,000 interest to be paid over a four week period.

In March 1970, payments by Kanof and Hurwitz again became sporadic. This led to further threats from Lore. At Lore's direction, a subcontract was entered into between the borrowers' company and C & P Painting. The latter was controlled by defendant Angelo Tuminaro and appellant Ross' son-in-law, among others. The company was identified by Lore as "my friends". The subcontract turned out to be a no-profit contract for the borrowers. After one week, the subcontract was breached by C & P. Lore arranged several meetings between the principals at C & P's offices; and at each meeting Lore left the borrowers to converse with Ross.

From that point on, there were frequent defaults in payments on the part of Kanof and Hurwitz. On May 4, Lore instructed the borrowers to deliver the payment for that week at a specified site or they would be killed. That payment was made as directed.

Shortly thereafter, Kanof and Hurwitz obtained some stock upon which they hoped to be able to obtain a loan. They informed Lore. He directed them to go to a particular bank branch and to inform a specified officer that they

had been sent by Ross. The instructions were followed, but the bank refused to make a loan on the stock.

In June, in addition to the weekly payments, Lore demanded and received from the borrowers some $500 worth of plumbing fixtures. Also during June, Lore directed Kanof to determine the feasibility of converting a certain Brooklyn building into a drug rehabilitation or day care center in satisfaction of the back-payments due. It was later learned that the building was owned by a corporation of which Ross and Tuminaro were the principals. When the proposed conversion proved unfeasible, Lore told the borrowers to forget they had ever seen the building.

The demands upon the borrowers continued. At one point Lore actually bit Kanof's hand and threatened to gouge out Hurwitz's eyes. Gunpoint confrontations followed. At another time, Lore stabbed Kanof's hand with a table fork and bit Kanof's face.

On August 11, following some further inquiries into the value of a Brooklyn building owned by the borrowers, Lore directed that the mortgage on that building be transferred to Ross' daughter. Sometime around that date the borrowers met Tuminaro for the first time. At this meeting, Tuminaro told them that Lore had been too easy on them and that if they were really having trouble raising money they should rob a bank. Tuminaro said that he and Lore would supply a gun.

Lore subsequently suggested to Kanof that he take out an insurance policy on Hurwitz's life in the amount owed and that Lore and his people would arrange for Hurwitz's death.

On October 15, Lore directed the borrowers to execute the mortgage assignment on their Brooklyn building to appellant Ross, not to his daughter. The assignment was executed accordingly and was recorded.

On November 3, Kanof and Hurwitz were given an ultimatum by Lore that unless they came up with $10,000 they would both be killed. Kanof and Hurwitz went to the FBI. On November 4, a conversation was taped in which Lore repeated his threats of the day before. On the following day, the borrowers met Maida and Lore while under FBI surveillance. Maida and Lore thereupon were arrested.

By July 1971, Sclafani and Randazzo also had been arrested. The original extortion indictment was returned against those four, as well as against Tuminaro who at that time was a fugitive.

In August 1971, the four who had been arrested were released on bail. Lore and Tuminaro met with Ross. The FBI investigation was the topic of discussion. Ross referred to the $50,000 that "we" had loaned to Hurwitz. A meeting with the borrowers was then sought in an attempt to change at least Hurwitz's testimony. This resulted in a separate indictment returned September 16, 1971 charging Lore, Ross and Tuminaro with obstruction of justice (the "obstruction of justice indictment").

The instant extortion indictment against Lore, Maida, Randazzo, Tuminaro, Sclafani and Ross was returned on November 3, 1971.

At the trial of the extortion indictment, Sclafani did not testify and called no witnesses. Ross did testify and he called three witnesses. His defense in substance was a denial of any knowledge of the scheme or any connection therewith, together with the assertion that one Hymie Rabinowitz (who was dead at the time of trial) was the kingpin and not Ross.

There was a great deal of other evidence adduced at the four week trial. The evidence of course must be viewed in the light most favorable to the government at this stage of the case. *United States* v. *D'Avanzo*, 443 F.2d 1224, 1225 (2 Cir.), *cert. denied*, 404 U.S. 850 (1971). Ross does not

challenge the sufficiency of the evidence at all, as his counsel made very clear to us at the argument of this appeal. Nor does Sclafani, with the exception of certain claims with respect to the income tax evasion counts and counts 3 and 4 which charge violations of 18 U.S.C. §893.

We hold that the evidence overwhelmingly and conclusively established the guilt of both appellants on all counts upon which they were convicted.

II.

Claim That Appellants Were Precluded From Calling Co-Defendant Lore as a Trial Witness

We turn directly to the chief claim of error raised on appeal by both appellants: that they were precluded from calling co-defendant Lore as a witness at their trial because of certain remarks made by the trial judge—some three to five months before the trial—in accepting Lore's change of plea and in sentencing him. A summary of the proceedings in the trial court involving this claim is necessary to an understanding of our ruling thereon.

On November 16, 1971, a not guilty plea had been entered by the court on behalf of Lore to each of the nine counts in which he was named in the extortion indictment.

On April 3, 1972,[2] accompanied by counsel, Lore appeared before Judge Palmieri, withdrew his not guilty pleas and pled guilty to count 3 (conspiracy to finance an extortionate credit transaction) and to count 11 (income tax evasion). At the same time, he pled guilty to one count of conspiracy to obstruct justice as charged in the separate indictment returned September 16, 1971 against Lore, Ross and Tumminaro. Before accepting Lore's guilty pleas, Judge Palmieri conducted an exhaustive voir dire by personally addressing Lore, pursuant to Fed. R. Crim. P.

2 At this time, the trial was scheduled to begin on April 17.

11, to determine whether there was a factual basis for the pleas and whether they were made voluntarily with understanding of the nature of the charges and the consequences of the pleas. During the course of the voir dire, Lore acknowledged the correctness of transcripts of tape recordings squarely implicating him in many of the essential transactions involved in the counts to which he was pleading guilty. A presentence report was ordered and sentencing was tentatively scheduled for May 17.

On the same day, April 3, another co-defendant, Maida, pled guilty to counts 3 and 7 of the extortion indictment which charged him with the same corresponding offenses as those to which Lore pled guilty. Judge Palmieri conducted a similar voir dire of Maida. Sentencing of Maida also was tentatively scheduled for May 17.[3]

At the conclusion of the change of plea proceedings on April 3, Judge Palmieri, at the request of government counsel, cautioned both Lore and Maida to stay away from any prospective witness in the case.[4]

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3 Maida later was sentenced, on November 21, 1972, to consecutive three-year terms of imprisonment on each of counts 3 and 7 of the extortion indictment. He was fined a total of $5,000.

4 The government's request and Judge Palmieri's instructions to Lore and Maida were as follows:

"MR. ARONWALD: Your Honor, I would ask your Honor just one thing, and that is to reiterate your previous instructions to the defendant Lore and also to the defendant Maida, that although they have now entered pleas of guilty, they are still to stay away from any witness or prospective witness in this case, most particularly Hurwitz and Kanof.

THE COURT: Yes, I instruct you both, Joseph Maida and Vincent Lore, to stay away from anybody connected with these cases.

This case is going to go to trial on April 17, and any approaches you make, friendly or otherwise, will be construed to your prejudice. So just stay away from them like poison.

You understand that, Joseph Maida?

DEFENDANT MAIDA: Yes, sir.

THE COURT: You understand that, Vincent Lore?

DEFENDANT LORE: Yes, sir.

THE COURT: All right."

Following the death of Lore's father and the postponement of Lore's sentencing, counsel for Lore moved on June 12 for imposition of sentence before the end of the month, without waiting for the conclusion of the trial of Sclafani and Ross which in the meanwhile had been further postponed. Lore had written a letter to Judge Palmieri on May 27 stating that the death of his father had left him responsible for his mother as well as his wife and two children; and that he was anxious to straighten out his life by paying whatever penalty he had to pay and getting it over with. Judge Palmieri was "very deeply impressed by this young man's desire to square himself with God and family . . . ." He indicated that he was inclined to grant Lore's motion for imposition of sentence.

The government initially opposed having Lore sentenced before the trial was concluded. Government counsel pointed out that the court would be in a better position to sentence Lore after it had heard the trial evidence; and that, if Lore should testify at the trial, the court could take that into consideration in imposing sentence, including any false testimony.

Judge Palmieri then made this proposal:

> "THE COURT: I have a way out of that. I can impose a sentence that I think he ought to have on one of the counts and I can leave the other count open with a reservation that if he takes the stand and commits perjury I would take into account all of the subsequent conduct with respect to the other count.
>
> If I had no reason to suspect this man was acting in bad faith, but was trying to unburden his soul of his problem, then I would just make the sentence concurrent with the other count."

After some further colloquy, the court indicated that it intended on June 28 to sentence Lore on the two counts in the extortion indictment to which he had pled guilty, and to defer imposition of sentence on the obstruction of justice count until after the trial was concluded. Counsel for the government and counsel for Lore agreed to this procedure. The case was continued to June 28 for sentencing.[5]

On June 28, Lore was sentenced, pursuant to 18 U.S.C. §4208(a)(2)(1970), to concurrent four year terms of imprisonment on each of the extortion indictment counts to which he had pled guilty. Judge Palmieri then said, "The sentence on the obstruction of justice indictment . . . will remain open, and I postpone sentence sine die on that, to abide the disposition of the trials and pleas of the other co-defendants." On motion of the government, the remaining seven counts of the extortion indictment were dismissed as against Lore.

In his remarks to the court on June 28 before sentence was imposed, Lore's counsel stated:

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5 At the June 12 hearing, Judge Palmieri asked Lore's counsel whether he had "any idea what [Lore's] disposition is with respect to testifying at this trial as a witness for the defendants?" Counsel said, "I don't know. I have not conferred with him." Judge Palmieri then stated:

> "THE COURT: It would be better if he had nothing to do with it. I don't want to deprive anybody of the right to call witnesses. It is a God-given right. The government could call him, just as they could. But I think from his standpoint it would be better if he had as little to do with the case as possible."

Lore's counsel responded, "That would be true from his point of view." This colloquy immediately followed a statement by government counsel reminding the court of Lore's conduct, subsequent to the return of the first extortion indictment, of intimidating government witnesses: "With respect to the two witnesses in this case, the government witnesses, only because of Mr. Lore's overt acts of intimidating, has the government been forced since that time to place both of those people and the respective members of their families in protective custody at tremendous cost to the government. If Mr. Lore had not approached either one of them, that would not have been necessary." See note 3, *supra*.

> **". . . . I know it is my feeling that in any trial here Mr. Lore should stay absolutely as far away from participating as the law would permit. If Mr. Aronwald or anybody else feels that a subpoena is appropriate, to have him come, we will come and he will testify and he will tell the truth. But other than that, your Honor, he has no intention of being a voluntary participant for anybody. I don't think that this is at all inappropriate, given the circumstances, and I don't think that it should weigh one way or the other. If Mr. Aronwald wants to subpoena him and put him on the stand, he is going to tell the truth, but it is not his intention to come for anybody."**

In like vein, Judge Palmieri said to Lore immediately before imposing sentence:

> "Your attorney told me that he hopes that you will stay as far away as possible from the unfinished cases, and I hope that will be true. I hope that you will have the courage and the strength to tear out the roots that you have in this community, because I think that they are like an infected sore. I think that you have been brought up, up to this point, exposed to crime and with people involved in crime, and as long as you stay within shouting distance or even communication distance of these people your future is going to be tainted and infected. I think that you ought to find new horizons in a new community, far away from the one in which you have lived and to find new strength and new rewards far away from the people who have poisoned your existence and placed you on the road of delinquency."

Based on the foregoing, both appellants argue that they were precluded from calling co-defendant Lore as a trial witness and consequently were denied due process of law

in violation of the Fifth Amendment and their right to compulsory process in violation of the Sixth Amendment. We disagree.

First, with respect to the procedure followed by Judge Palmieri in leaving open the imposition of sentence on Lore on the obstruction of justice count until "the disposition of the trials and pleas of the other co-defendants", this clearly was within the discretion of the trial judge. Postponement of sentencing a defendant who pleads guilty until the conclusion of the trial of remaining co-defendants is done as a matter of course by trial judges, especially when requested by the government. Here Judge Palmieri was confronted with competing claims: the government requested that sentencing on all counts be deferred until the conclusion of the trial; Lore's counsel requested immediate imposition of sentence on all counts. For the reasons stated by Judge Palmieri on the record, we hold that his accommodation of the competing interests by imposing sentence on the two extortion indictment counts and leaving open the imposition of sentence on the obstruction of justice indictment count was not an abuse of discretion.

Second, the record shows that Lore at all times was available to be subpoenaed as a witness by appellants, but that they chose not to do so. At the sentencing of Lore on June 28, his counsel said to the court: "If Mr. Aronwald or anybody else feels that a subpoena is appropriate, to have him come, we will come and he will testify and he will tell the truth." At the proceedings on June 12, Judge Palmieri had stated: "I don't want to deprive anybody of the right to call witnesses. It is a God-given right. The government could call him, just as [the defendants] could." On the first day of trial, September 11, Lore's counsel came to the courtroom at Judge Palmieri's request and stated it was Lore's position "that if he were subpoenaed

he would tell the truth but other than that he doesn't want anything to do with it." In response, Judge Palmieri said:

> **"THE COURT (addressing Lore's counsel): Have you advised him that he is not immune from the service of subpoena and that he can be brought to court and questioned and has no right to claim immunity in this case and if counsel chooses to question him without prior conference, they have a right to do so?**
>
> **Does he realize he is under that Sword of Damocles?**
>
> **MR. OWEN (Lore's counsel): He knows he can be subpoenaed and brought here. Whether he has certain Fifth Amendment rights given the nature of the questioning, I don't know.**
>
> **THE COURT: To the extent that any question would relate to this case, I don't see how he can claim Fifth Amendment rights.**
>
> *** * ***
>
> **THE COURT (addressing appellant Ross' counsel): Now, we have the same problem with this defendant [Lore]. It is not an unusual problem. He has pleaded guilty to the very charges leveled against your client and it is surprising to me that you feel he is your hope for exculpation. If you want him, his body will be produced but I can't force him to confer with you."**

Despite the availability of Lore to be subpoenaed as a witness and the emphatic indication by Judge Palmieri that he would be required to testify if subpoenaed, neither Sclafani nor Ross ever subpoenaed him. And there was no doubt as to Lore's whereabouts, for he had been incarcerated since his surrender on July 5, following the imposition of sentence on June 28.

Third, the record demonstrates, both directly and by strong inference, that there were compelling reasons (other

than Judge Palmieri's remarks) why neither appellant chose to call Lore as a trial witness. As a co-defendant, Lore had pled guilty to the charge of having conspired with both Sclafani and Ross to finance an extortionate credit transaction, and of having conspired with Ross to obstruct justice. Experience on the trial bench has taught that rarely if ever do defendants charged with conspiracy call as a witness on their behalf a co-defendant who has pled guilty to the very conspiracy for which defendants are on trial. That inhibition would appear to have been particularly strong here since appellants knew that at the time of Lore's change of plea on April 3 he had acknowledged, during the voir dire conducted by the court, the correctness of transcripts of tape recordings squarely implicating him in many of the essential transactions involved in the counts to which he was pleading guilty. The summary set forth above of the loansharking scheme at the core of this case indicates the depth of Lore's involvement, and particularly his dominant role in committing acts of violence.[6] It is understandable therefore that Sclafani's trial counsel, after listening to tape recorded conversations between Lore and the government's key witnesses, felt that it would be harmful to Sclafani's case if Lore were called on his behalf; and, accordingly, on the first day of the

6 At the sentencing of Lore on June 28, government counsel, in urging the imposition of maximum consecutive sentences, informed the court:

"... I tell your Honor that it is Mr. Lore and Mr. Lore predominantly that displayed acts of violence to these two victims. Mr. Lore on several occasions inflicted bodily injury and physical harm to these victims.

Mr. Lore, and Mr. Lore only, inflicted fear in the hearts of Mr. [Kanof's] wife by going out to her home after this indictment had been returned and intimidating or placing fear in the heart of her daughter, who was in the house alone when her mother and father were out, by coming to the house to talk to her father, to talk to him about what? To talk to him about cooperating with Mr. Lore and his co-defendants in changing his testimony in this case."

trial, September 11, he advised Judge Palmieri that "I had decided that, under no circumstances, would I call Vincent Lore, a co-defendant, as a witness for, or on behalf of, my client."[7] Ross' trial counsel, on the sixth day of the trial, September 19, informed Judge Palmieri that Lore's counsel had told him that Lore would be willing to confer with Ross' counsel and that he "would testify to exculpate Ross." The record is silent as to whether Ross' trial counsel ever did confer with Lore. But Lore was not called as a witness by either Sclafani or Ross. As we recently observed in a closely analogous situation, "'[i]f any general inference is to be drawn from the entire transcript . . . it would be that if either side had been disposed to call [the] witness it would have been the Government and that the probability that, after interview, the defendants would have decided not to call [the] witness is all but overwhelming.'" *United States* v. *Mosca*, 475 F.2d 1052, 1059 (2 Cir.), *cert. denied*, —— U.S. —— (1973), 41 U.S.L.W. 3657 (U.S. June 18, 1973).[8]

Fourth, Judge Palmieri's remarks at the proceedings on June 12 that ". . . I think from his standpoint it would be

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7 Counsel for both appellants have addressed numerous communications to us urging that we strike from the record an affidavit sworn to March 26, 1973 by Sclafani's trial counsel, Jack Evseroff, Esq., confirming this statement to the trial judge. We decline to do so, for the reasons (1) that the affidavit in question was certified and transmitted to this Court in accordance with Fed. R. App. P. 10(e), including an order of Judge Palmieri entered April 6, 1973 directing that the affidavit be docketed and made part of the record in this Court; and (2) that we would reach the same conclusion, absent the Evseroff affidavit, since it does no more than confirm what the record shows anyway—that Lore was not called as a witness for the compelling reasons stated above.

8 In *Mosca*, we rejected appellants' claims that they had been denied due process and the right to compulsory process resulting from the government's failure upon request to make available at trial a potential witness whose whereabouts was known to the government but not to appellants.

better if he had as little to do with the case as possible",[9] under the circumstances were neither threatening nor harassing nor did they effectively drive Lore as a witness off the stand. Such remarks, considered fairly and in context, obviously were intended to caution Lore against further association with those who had gotten him into trouble in this case—"the people who have poisoned your existence and placed you on the road of delinquency." See Judge Palmieri's sentencing remarks on June 28, *supra*. Earlier, at the time of Lore's change of plea on April 3, both Lore and Maida had been instructed "to stay away from any witness or prospective witness in this case." See note 4, *supra*. Such cautionary remarks and instructions clearly were justified by Lore's record of having intimidated government witnesses subsequent to the original extortion indictment, see note 5, *supra*, and of having attempted to talk to one of the victim witnesses "about cooperating with Mr. Lore and his co-defendants in changing his testimony in this case." See note 6, *supra*. But balanced against these cautionary remarks were Judge Palmieri's repeated and emphatic statements that Lore was available as a witness to either side and that he would be required to testify if subpoenaed. And Lore's own counsel made it abundantly clear that, while Lore had "no intention of being a voluntary participant for anybody", nevertheless "[i]f [government counsel] or anybody else feels that a subpoena is appropriate, to have him come, we will come and he will testify and he will tell the truth." See remarks by Lore's counsel at the sentencing of Lore on June 28, *supra*. In short, the record demonstrates beyond any doubt whatsoever in our minds that this is not a case

9 We consider these remarks in conjunction with the judge's similar remarks at the sentencing of Lore on June 28: "Your attorney told me that he hopes that you will stay as far away as possible from the unfinished cases, and I hope that will be true."

where "the judge's threatening remarks, directed alone at the single witness for the defense, effectively drove that witness off the stand." *Webb* v. *Texas*, 409 U.S. 95, 98 (1972) (per curiam).[10] Rather, this is a case where Lore did not appear as a witness because neither appellant chose to call him—for compelling reasons wholly aside from Judge Palmieri's remarks.

Finally, for essentially the reasons discussed in detail above, we are satisfied that no substantial right or interest of either appellant was prejudiced by the remarks of Judge Palmieri to co-defendant Lore at his change of plea proceedings in April or at his sentencing proceedings in June. Even assuming arguendo—contrary to our holding—that appellants were precluded from calling Lore as a trial witness because of the remarks of the trial judge, our careful examination of the entire transcript of this nineteen day trial convinces us that Lore's testimony could not conceivably have been helpful to appellants and it most assuredly would not have changed the result. Thus, "we are

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10 In our view, appellants' massive reliance upon *Webb* is misplaced. All else aside, unlike "The sole witness for the defense" in *Webb*, Lore was a co-defendant who had pled guilty to the very conspiracy for which appellants were on trial. And, unlike the "threatening and harassing" remarks of the trial judge in *Webb* in "coercing the only defense witness into refusing to testify", our careful reading of Judge Palmieri's remarks in the instant case in context leaves us with the firm conviction that they in no way threatened or harassed the witness, nor can they fairly be construed as having coerced the witness into refusing to testify.

Although the Supreme Court decided *Webb* on December 4, 1972—the day upon which Selafani was sentenced in the instant case—the principle which is controlling here has long been recognized in this Circuit. See, e.g., *United States* v. *Marzano*, 149 F.2d 923, 926 (2 Cir. 1945) (L. Hand): "It is true that a person who has pleaded guilty and has not yet been sentenced may testify; it is also true that such a witness always hopes that by testifying he will lessen his punishment; but he is not told that his testimony must be satisfactory to the court to secure any favor; and it would be altogether intolerable, if he were."

We agree; and we hold that by no stretch can Judge Palmieri's remarks be construed as having told Lore "that his testimony must be satisfactory to the court to secure any favor."

left with the firm conviction that [his] testimony . . . would have had no effect on the outcome of the case, except possibly to strengthen the government's evidence . . . ." *United States* v. *Mosca, supra,* 475 F.2d at 1060. The evidence of both appellants' guilt in this case is not only overwhelming; it is conclusive. Appellant Ross does not challenge the sufficiency of the evidence at all.[11] Appellant Sclafani challenges its sufficiency only in respects which are here immaterial. We hold that Judge Palmieri's remarks, if error at all, were harmless, for we can say with fair assurance, "after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error . . . ." *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946). See *Cohen* v. *Franchard Corp.,* —— F.2d ——, —— (2 Cir. 1973), slip op. 2819, 2838 (April 11, 1973); *United States* v. *Mosca, supra,* 475 F.2d at 1058; *United States* v. *McCarthy,* 473 F.2d 300, 308 (2 Cir. 1972); *United States* v. *Ellis,* 461 F.2d 962, 970 (2 Cir.), *cert. denied,* 409 U.S. 866 (1972).

III.

Claim of Misconduct by Trial Judge

The only other claim of error which warrants brief mention—primarily in fairness to the trial judge—is the con-

11 We regard as little short of fanciful Ross' assertion on appeal that, if Lore had been called as a trial witness, he would have testified that one Hymie Rabinowitz (who was dead at the time of trial), rather than Ross, had loaned the money to Kanof and Hurwitz. True, Lore had made a statement to this effect at the time of his change of plea on April 3. But co-defendant Maida had made a similar statement on the same occasion; indeed, Maida was even more specific in stating that he had received $50,000 from Rabinowitz, that he delivered that sum to Kanof and Hurwitz, and that he and Lore were responsible for collecting the interest and repayments of principal from the borrowers.

Significantly, Maida was not called as a defense witness at trial. And it is not claimed that he was deterred from testifying by any remarks of the trial judge.

tention by both appellants that misconduct by the trial judge precluded a fair trial. This claim focuses upon three aspects of the proceedings below: (1) denial of a motion to disqualify the judge; (2) conduct of the trial itself; and (3) the charge. We find no merit in any aspect of this claim.

(1) *Motion To Disqualify*

On August 30, 1972—twelve days before the trial was scheduled to begin—appellant Ross filed a motion to disqualify Judge Palmieri pursuant to 28 U.S.C. §144 (1970). The motion was accompanied by a seven page affidavit by Ross' attorney and a one paragraph affidavit by Ross himself which adopted "[e]verything set forth in Mr. Goldberg's affidavit." The motion sought to disqualify the judge on the ground that remarks made by him at the sentencing of Lore two months earlier had manifested a personal bias against Ross. Judge Palmieri denied the motion in a written memorandum filed August 30. We hold that the motion was properly denied.

Disqualification is warranted and appropriate only if the alleged bias and prejudice stems from an extrajudicial source and has resulted in the formulation of an opinion on the merits not based upon what the judge has learned by his participation in the proceedings before him—a situation totally absent here. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966).

A judge is duty-bound not to disqualify himself upon such a legally insufficient ground as that urged by Ross below. *Rosen* v. *Sugarman*, 357 F.2d 794, 797 (2 Cir. 1966); *In re Union Leader Corp.*, 292 F.2d 381, 391 (1 Cir.), *cert. denied*, 368 U.S. 927 (1961); *United States ex rel. Rogers* v. *Richmond*, 178 F.Supp. 44, 48 (D.Conn. 1958); *Town of East Haven* v. *Eastern Airlines, Inc.*, 293 F.Supp. 184, 189 (D.Conn. 1968).

(2) *Conduct of Trial*

Appellant Ross, joined to some extent by appellant Sclafani, has mounted a massive attack upon the conduct of the trial by Judge Palmieri. The claim in essence is that the judge so interfered with the course of the trial and demonstrated such bias against appellants as to preclude a fair trial.

In view of the nature of appellants' claimed error in this regard and the vehemence with which the claim is asserted, we have carefully examined the entire trial transcript of more than 3200 pages covering this nineteen day trial. *Daley* v. *United States*, 321 F.2d 123, 128 (1 Cir.), *cert. denied*, 351 U.S. 964 (1956).

Based on our scrutiny of the record from cover to cover, we have reached the following conclusions:

(1) The conduct of the trial judge complained of was far from unprovoked by defense counsel.[12]

(2) The trial judge's remarks admonishing counsel for conduct which he believed to be improper were made, with very few exceptions, out of the presence of the jury—a distinction which unfortunately the briefs on appeal fail to make clear. See *United States* v. *Boatner*, —— F.2d ——, —— (2 Cir. 1973), slip op. 3307, 3313 (May 4, 1973).

(3) In every instance complained of, where the judge either questioned a witness himself or interrupted counsel's questioning of a witness, we are satisfied that the judge was doing his very best to clarify the issues and assist the jury in understanding the evidence. In short, the judge did precisely what we

12 Both appellants were represented at trial by counsel other than their counsel on appeal.

sanctioned in *United States* v. *DeSisto*, 289 F.2d 833, 834 (2 Cir. 1961):

> "A trial judge in criminal, as in civil cases, may, indeed must, be more than a mere moderator or umpire in a contest between two parties in an arena before him. He should take part where necessary to clarify testimony and assist the jury in understanding the evidence and its task of weighing it in the resolution of issues of fact."

(4) We have not found a single instance of conduct on the part of the judge in this voluminous record covering the four week trial which, considered in context and in fairness to all parties, in any way prejudiced either appellant or displayed the slightest bias toward them.

We hold that the conduct of the trial judge did not deprive appellants of a fair trial. *Cohen* v. *Franchard Corp.*, *supra*, —— F.2d at ——, slip op. 2819 at 2837-38; *United States* v. *McCarthy*, *supra*, 473 F.2d at 307-08; *United States* v. *D'Anna*, 450 F.2d 1201, 1206 (2 Cir. 1971); *United States* v. *DeSisto*, *supra*, 289 F.2d at 834; *Daley* v. *United States*, *supra*, 231 F.2d at 130.

(3) *The Charge*

Appellants' attack upon the charge is based essentially on the claim that it was slanted in favor of the government and displayed bias against appellants. We have scrupulously examined the entire charge which occupies 130 pages of the transcript. We find no merit in appellants' claim.

The judge's summary of the evidence was entirely in keeping with our repeated suggestions to trial judges, particularly in a conspiracy case with multiple counts and multiple defendants. In summarizing the evidence and in

commenting upon it, the judge exercised great care in reminding the jury that it was their recollection that controlled and not that of the court.

The instructions on the credibility of witnesses were in accordance with standards uniformly approved by us and, in our view, were especially appropriate in this case, including the instruction by which the credibility of a defendant who takes the stand is to be evaluated. See *United States* v. *Mahler*, 363 F.2d 673, 678 (2 Cir. 1966), and authorities cited.

In short, upon the entire record, we hold that the trial judge did "remain the judge, impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence [was] soberly and fairly tested." *United States* v. *Brandt*, 196 F.2d 653, 655-56 (2 Cir. 1952).

IV.

Other Claims

Finally, we have carefully considered each of appellants' other claims of error. We find no merit in any of them either separately or cumulatively.

Appellants were convicted of serious crimes after a fair trial on the basis of overwhelming evidence.

Affirmed.

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Nos. 73-196 and 73-351

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In the Supreme Court of the United States

OCTOBER TERM, 1973

GUS SCLAFANI, PETITIONER

v.

UNITED STATES OF AMERICA

BEN ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that comments by the trial court improperly discouraged a codefendant from testifying in their behalf. Petitioner Sclafani also contends that the evidence against him was insufficient on certain counts and that the trial court erred in instructing the jury on conspiracy.

After a jury trial in the United States District Court for the Southern District of New York, petitioner Ross was convicted on three counts of conspiracy and substantive violations of the Extortionate Credit Act (18

U.S.C. 371, 893, and 894), three counts of income tax evasion (26 U.S.C. 7201), and three counts of filing a false and fraudulent income tax return (26 U.S.C. 7206). Petitioner Sclafani was convicted on four counts of conspiracy and substantive violations of the Extortionate Credit Act (18 U.S.C. 371, 893, and 894), two counts of income tax evasion (26 U.S.C. 7201), and one count of making a false statement to the government in connection with his 1970 income taxes (18 U.S.C. 1001).[1] Petitioner Ross received an aggregate sentence of imprisonment for fifteen years and a fine of $90,000; petitioner Sclafani was sentenced to imprisonment for a total of ten years with a fine of $30,000. The court of appeals affirmed in a thorough opinion (Ross Pet. App. 1a-23a; Sclafani Pet. App. 1a-23a).

The facts are recounted at length in the opinion of the court of appeals. They show that, from 1968 to 1971, petitioners and their codefendants loaned large sums of money to Morton Kanoff and Herbert Hurwitz, two building contractors in New York City, at interest rates of more than 3 percent per week, and then collected interest and principal on the loans from Hurwitz and Kanoff by means of physical force and threats of violence, maiming, and even death. There was substantial evidence supporting the jury's finding that the defendants operated together, that they financed the extortionate loans, and that they had the loans delivered to the two borrowers by Joseph Maida, Joseph Randazzo, and petitioner Gus Sclafani.

Petitioner Ross does not dispute the sufficiency of the evidence against him. Several payments from victims

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[1] Three codefendants (Vincent Lore, Joseph Maida, and Joseph Randazzo) pleaded guilty before trial, while a fourth codefendant (Angelo Tuminaro) was a fugitive.

were traced to him, and in August 1971 he acknowledged having participated in a loan of $50,000 to Hurwitz and Kanoff. There was also extensive evidence establishing petitioner Sclafani's role in the extortion operation. He made weekly collections of payments from the borrowers during the period from July to October 1969. He also delivered two cash loans totaling $25,000 to the borrowers and on several occasions told Hurwitz and Kanoff he would break their legs, arms, and heads if they failed to make payments on time.

1. There is no merit to petitioner Sclafani's claim that the evidence against him was insufficient to show that he helped finance the extortionate loans, within the meaning of 18 U.S.C. 893, and that he willfully engaged in income tax evasion. The jury could properly infer from the evidence that Sclafani was engaged with his codefendants in a partnership or profit-sharing venture, pursuant to which money was advanced as a loan, investment, or otherwise to Joseph Randazzo, Joseph Maida, and petitioner Sclafani to use in making extortionate loans to others. Participation in such a joint operation was sufficient action to support a conviction for conspiracy and for the substantive violation of 18 U.S.C. 893. Petitioner Sclafani risked imprisonment for a substantial period of time by reason of the threats of bodily injury which he made to Kanoff and Hurwitz. His delivery of $25,000 in cash to the two victims and his numerous pickups of large interest payments from them raised a permissible inference that he had a stake or proprietary interest in the criminal venture and that he received a portion of the enormous profits generated by it.

It was also reasonable for the jury to conclude that Sclafani willfully evaded his federal income taxes by

reporting income of only approximately $3,000 in 1968 and 1970 and by reporting no income in 1969. In an income tax prosecution, the government need only establish that the amount of taxes evaded was substantial and need not prove the exact amount. *United States* v. *Marcus*, 401 F. 2d 563 (C.A. 2), certiorari denied, 393 U.S. 1023. The government met this burden below, and petitioner Sclafani's conviction for income tax evasion should therefore stand.

2. Petitioners' contention that the trial court violated their rights by threatening to sentence codefendant Vincent Lore more severely if he testified in their defense was thoroughly examined and rejected by the court of appeals in a discussion upon which we rely (Ross Pet. App. 7a-19a; Sclafani Pet. App. 8a-19a). Lore was not intimidated or prevented from testifying. He was available to the defense as a witness at all times during the trial, but petitioners chose not to call him to the stand.[2]

3. Petitioner Sclafani's challenge to the jury charge (Sclafani Pet. 24-27) is also without merit. The trial court correctly instructed the jurors that they could not find a defendant guilty of income tax evasion unless they found that he had taxable income which he know-

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[2] As the court of appeals pointed out (Ross Pet. App. 17a-18a; Sclafani Pet. App. 17a-18a), petitioners' reliance on *Webb* v. *Texas*, 409 U.S. 95, is misplaced. Unlike the judge in *Webb*, the trial judge below did not express or imply any belief that Lore would lie if called to testify. The court did not threaten Lore, but only indicated that final sentencing would be delayed until after petitioners' trial in case Lore did in fact perjure himself. It is significant that, even after the trial court's remarks, counsel for Lore indicated that Lore would respond to any subpoena to testify and would tell the truth if called (Ross Pet. App. 17a; Sclafani Pet. App. 17a).

ingly and willfully failed to report in order to evade payment of a substantial tax due and owing the United States (App. 206).[3] The jury could reasonably infer from the evidence that petitioner Sclafani shared with his codefendants in the proceeds of the extortionate scheme and that his failure to report his share as income was deliberately designed to avoid payment of a substantial federal tax.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[3] "App." refers to the Appendix in the court of appeals.

CERTIORARI DENIED